Supreme Court, U.S.
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No.

# In the Supreme Court of the United States

OCTOBER TERM, 1995

SALVADOR MAGLUTA,
PETITIONER,

*v.*

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

## SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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**SUPPLEMENTAL APPENDIX.**

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-6060 CR MORENO

UNITED STATES OF AMERICA,
Plaintiff,

v.

SALVADOR MAGLUTA, ORLANDO LORENZO and AUGUSTO FALCON,
Defendants.

## REPORT AND RECOMMENDATION

This cause is before this court on the Motion to Suppress Evidence Seized in Searches Conducted on or about October 15, 1991 filed by Defendants Salvador Magluta, Orlando Lorenzo and Augusto Falcon pursuant to an order of reference entered by the Honorable Ferderico A. Moreno, United States District Judge.

This court has reviewed the motion, the response by the government, the reply and the file in this case. An evidentiary hearing was held on this motion beginning on June 14, 1993. The transcript of the hearing has been filed with this court (D.E. #479-84) and is incorporated herein as part of this report and recommendation.

## DISCUSSION

The Defendants' Motion to Suppress involves the entry into, and searches of, homes at 98 East La Gorce Circle, Miami Beach and at 1247 Seminole Drive, Fort Lauderdale. Each of

these homes was entered for the purpose of executing arrest warrants for the defendants.

On August 20, 1992, this court entered an order finding that the Defendants had standing to challenge the searches of the two homes[1] and that the affidavits for the search warrants describe the items to be seized with sufficient particularity. This court also made a preliminary determination that the affidavits contained sufficient probable cause. However, as noted in the order, this finding was based in part on material provided by the challenged initial entries into the residences.[2] Thus, a final determination or probable cause will be made below.

While much argument and evidence was presented to this court on this motion, the defendants' argument focuses on two main issues: (1) Whether the entries into the residences, under the authority of the arrest warrants, were proper and, if so, (2) Whether the agents exceeded the scope of a permissible search incident to the entries.

## I. 98 EAST LA GORCE CIRCLE

The entry into the La Gorce home resulted in the arrest of Defendants Salvador Magluta and Orlando Lorenzo. Additionally, several items of contraband, including a box of currency, were found in the home. The discovery of these items was set out as part of an affidavit in support of a subsequent search warrant for the premises.

The focus of the argument in support of suppression of the items seized from this property is the claim by the Defendants that the agents lacked sufficient probable cause to believe that Magluta was a resident of the home and that he was on the prem-

[1] As discussed at the hearing on this matter, there is no dispute by the Defendants that Defendants Magluta and Lorenzo only maintain standing as to the La Gorce residence, while Falcon only has standing as to the Fort Lauderdale residence. (T. 7-134).

[2] This order is hereby incorporated into this report and recommendation.

ises at the time the arrest warrants were executed. Additionally, the Defendants contend that the agents exceeded the permissible scope of the search, particularly in the seizure of a box of currency from a guest house.

## A. ENTRY INTO THE PREMISES

The entry into the La Gorce residence was under the authority of an arrest warrant for Salvador Magluta. The defendants contend that there was insufficient evidence for the government to believe that the residence was Magluta's and that he was in the residence at the time.

The evidence relied on by the government to show Magluta's connection with the property came from several government agents. Deputy Marshal Keith Braynon testified that he received information on October 13, 1991 from a reliable informant, who was in custody, as to the location of a residence for Magluta and Lorenzo. This source obtained the information from a co-defendant in this case, Luis Mendez. (T. 1-25).[3] The information passed to Braynon consisted of a map which he testified showed the location of the home at 98 La Gorce Circle.[4] The home was identified as belonging to Magluta, and the agent was also informed that Lorenzo was a frequent visitor. (T. 1-26). The source also indicated that Mendez had last been at the residence just prior to his September 19, 1991 arrest.

Braynon testified that he went to the residence two days after getting the information, at approximately 6:00 A.M. on October 15, 1991, and took a drive through the circular driveway between the main house and a smaller guest house. Braynon observed a large motorhome, a gold Honda, a gray Pathfin-

[3] All references are to the transcript volume and page.

[4] The map was not in existence at the time of the hearing and had not been produced to the Defendants.

der and a White Chevy Astro van parked on the premises. (T. 1-29). Braynon later returned with other agents to conduct surveillance of the property. During the surveillance, Braynon saw the gold Honda previously observed at the residence leave the island occupied by someone he stated appeared to be Lorenzo.

Braynon spoke with the afternoon guard on the island, and showed him a photograph of Lorenzo and one of Magluta. According to Braynon, the guard positively identified Lorenzo as "frequenting the residence." He also testified that the guard could not positively identify Magluta, but the guard stated that the photo resembles a person who lives at the residence. (T. 1-32). Braynon testified that the guard also indicated that a person who looks similar to Magluta drove a white Chevy Astro van. (T. 1-33).[5] Braynon stated that the Astro van he had seen at the residence that morning had not departed the residence during the surveillance. Braynon also testified that nobody every directly saw or identified Magluta at the residence. (T. 1-70).

Braynon testified that the gold Honda returned to the island at approximately 5:00 P.M. When the car stopped at the gate house, Braynon saw the occupant, whom he identified as Lorenzo. Braynon said that the gate was up when the car drove through, but the vehicle slowed down as it entered. (T. 1-125). The guard also identified Lorenzo. After meeting with other officers, entry to the residence was made at approximately 6:00 P.M.

According to Braynon, the agents were concerned about running out of daylight and bad weather after observing the gold Honda return. At that point, Braynon testified that he felt

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[5] In the government's response to the Motion to Suppress it stated (p. 3) that the afternoon guard identified the gray Pathfinder as the vehicle driven by the resident. Portions of the government's response were admitted into evidence as admissions against interest.

he had a good location for Lorenzo. (T. 1-138). Braynon also pointed to the relationship between Magluta and Lorenzo, the guard's tentative identification of Magluta, and the information from Mendez as indicating that the residence was Magluta's. (T. 1-138, 139).

Marshal Sean Conboy agreed that the location of the residence was based on the map given by the informant, and that the agents did not know who owned the Astro van or when it was last driven. (T. 2-90-91). Conboy testified that the belief that Magluta was in the residence came from the informant's information, the identification of the driver of the van and Lorenzo's presence. (T. 2-97).

Conboy also stated that, when the patrol car pulled into the driveway, there were four males standing in front of the residence. Immediately, one of the males, matching the description of Lorenzo, went inside the house. (T. 2-15). Conboy testified that the individual later captured and identified as Lorenzo was the same person who ran into the house initially. (T. 2-19). He added that, when he saw him run in he did not know it was Lorenzo, only that it was somebody that matched his description. (T. 2-104). After the officers shot tear gas into the residence and entered, Lorenzo was captured within minutes as he came from the upstairs to the lower floor. Magluta made an exit from the home, and was ultimately captured with the assistance of a police dog after he had hidden in some bushes.[6]

The defendant presented testimony from Michael Vaccaro, the afternoon security guard at La Gorce. He testified that the only identification made was of Lorenzo, and that he did not recall giving the description of the driver of the Astro van. Vac-

[6] The government asserted that Magluta's exit from the premises constituted an abandonment of the contents, and thus precludes raising any arguments for suppression. As noted in this court's order of August 20, 1992 and after discussion at the hearing, the government's argument is rejected.

caro also testified that Lorenzo returned to the island driving a sand colored BMW. According to Vaccaro, the entry gate was down, and Lorenzo's car stopped prior to it being opened. (T. 1-156). Vaccaro returned to the stand three days after this testimony and stated that he had recalled that Lorenzo had driven a silver Honda for a short time. (T. 4-62). Vaccaro also testified that he never told any government agent that the driver of the Astro van was a resident or renter at 98 La Gorce. (T. 4-63). He also testified that he never saw Magluta driving the Astro van. (T. 4-64), and described the driver as a very heavy-set man with glasses.

Michael Lorenzo, the morning guard at La Gorce testified that he identified a photo of Orlando Lorenzo but did not identify anyone else to the officers and did not talk about the activities at the residence or the drivers of the vehicles. (T. 1-286).

Further testimony concerning Lorenzo's vehicle came from defense witness Anthony Grant who testified that he played basketball with Lorenzo in the summer and fall of 1991. Grant stated that Lorenzo drove a Honda Accord and a BMW. (T. 4-82).

An arrest warrant founded on probable cause carries with it the "limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton* v. *New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639 (1980). In *Steagald* v. *United States*, 451 U.S. 204, 213, 101 S.Ct. 1642, 1648, 68 L.Ed.2d 38 (1981), the Court held that a search warrant is required for the execution of an arrest warrant in the home of a third party.

Defendants Magluta and Lorenzo contend that the government has failed to meet the burden to show that the marshals had reasons to believe that Magluta resided at 98 La Gorce and that he was present at the time the warrant was executed. According to the Defendants, the government must meet this

showing by "probable cause." The government responds that only a "reasonably articulable suspicion" is required. Neither side is able to cite to a definitive case on this matter, and none has been found by this court. However, in *Steagald*, the Court twice referred to "probable cause" in discussing the officer's belief that the subject of the arrest warrant was in the premises. As noted by the Court in footnote 7, "Specifically, absent exigent circumstances, the magistrate, rather than the police officer, must make the decision that probable cause exists to believe that the person or object to be seized is within a particular place." 451 U.S. at 214, n.7; *see also, id.* at 211, n.6.

This court finds that, even under the probable cause standard, the government had sufficient information to believe that Magluta resided at 98 La Gorce. The information supplied by Mendez, via the map, was corroborated in part by the identification of Lorenzo at the home, as well as the tentative identification of Magluta by the guard, as testified to by Marshal Braynon.

A much closer question is presented by the evidence on the issue of whether Magluta was in the residence at the time the entry occurred. The evidence presented to this court, as outlined above, shows cause to believe that Magluta resided at the property. However, there was no evidence that he was seen there that day, or even anytime within one month of the search. The presence of Lorenzo at the residence does not show that Magluta was also there, and the fact that Magluta may be connected to the Astro van is of little import since no one had seen Magluta in the house for at least one month. Additionally, there was no evidence as to the time frame that Magluta actually last drove the vehicle. This court finds insufficient evidence was presented to meet either the reasonable suspicion or probable cause standard. Furthermore, since the evidence obtained in the search of the property provided the probable cause for the issuance of the subsequent search war-

rant, that warrant cannot be upheld on the basis of the independent source doctrine. *See, Murray* v. *United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

The government also attempts to rely on exigency and hot pursuit to allow for entry into the premises. Both arguments must fail. The "hot pursuit" alleged for Lorenzo is not supported by the evidence which shows that, while someone went into the residence from outside when the police entered, no positive identification of Lorenzo was made at that time. Furthermore, the government relies on the fact that Lorenzo allegedly ran out of the back door and was chased back into the home to support this argument. However, the evidence presented to this court is that just prior to the entry, a male had run out of the back of the home, been confronted, and returned to the residence. (T. 2-19). There was no testimony that this man was in fact Lorenzo. Additionally, the marine unit did not follow the man inside the residence, rather, the officers in front continued with their planned entry. Lorenzo was ultimately captured in the home as he came down from an upstairs bedroom. This was not a situation involving a fleeing felon who had just committed an offense in front of an officer, but rather, some unidentified person going into a residence. Additionally, this court notes that Lorenzo was not in fact followed in from the front, but rather, the police went according to the procedures they had planned prior to seeing the individual reenter the premises.

Similarly, the exigency argument must fail based on the facts presented to this court which show that any exigent circumstances were created by the conduct of the agents in approaching the residence for entry. There has been no evidence presented to this court to show that surveillance could not have been maintained of the home while a search warrant, based on the presence of the fugitives in the residence, was obtained. Additionally, there has been no showing that the occupants of

the residence knew of the agents' presence at La Gorce. Finally, the testimony presented to this court was that the agents entered due to poor weather and nightfall rather than the fear of escape. Even if this somehow supported a claim of exigency, that argument must fail. The agents were in close proximity to the premises since 6:00 A.M. the day of the search. If they had probable cause to believe Magluta was on the premises (which they did not), their choice to wait and see if the person resembling Lorenzo would return cannot be used to create an exigent situation.

The government also asserts that the good faith doctrine of *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) applies to allow for the admission of the evidence from the residence. This argument is misplaced. The *Leon* good faith exception applies to errors in the preparation of a warrant, not in the execution of an otherwise valid warrant. *United States* v. *Medlin*, 798 F.2d 407 (10th Cir. 1986). As specifically noted in *Leon*, the Court's discussion "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Id.* at 918, n.19.

In the present case, the challenge by the defendants is to the execution of the arrest warrant, not as to whether there was probable cause for the warrant in the first instance. As noted, the arrest warrant did not have a specific address, and the execution of the warrant at La Gorce was the decision of law enforcement, and not that made by a neutral and detached magistrate. Thus, the good faith doctrine is inapplicable.

## B. SCOPE OF THE SEARCH INCIDENT TO THE ENTRY

If the District Court determines that the entry was in fact proper, the next issue facing the court is whether the agents exceeded the law in the extent of their search. Even though the

items found in the residence were ultimately seized with a warrant, if the information relied on to establish probable cause for the warrant was improperly discovered, it cannot be considered.

Marshal Braynon testified that no one other than the initial team entered the home prior to the search warrant, due to the strong presence of tear gas. Inspector Michael Cameron of the Marshals Service testified that the search of the residence included any space where someone could hide, including kitchen cabinets, closets and piles of clothing. (T. 1-191-93). As the search continued, the gas went to the upstairs area, which led to Lorenzo's surrender. Cameron testified that the irritant was still very strong when he left the premises at 9:00 P.M. and that no one had gone in to conduct a search. (T. 1-201).

David Hiebert of the Marshals Service testified that, after the gas was dispersed in the residence, the agents moved slowly throughout the home searching for suspects. (T. 3-138). Hiebert stated that, while searching one of the closets he noticed a lot of space behind a clothes hamper. According to Hiebert, there was enough room for someone to hide behind the hamper and the clothes hanging over it. When Hiebert kicked the hamper over, clothes came out in addition to two nylon gym bags. (T. 3-142). Hiebert also observed what he described as a "well equipped office" including a fax machine and a floor safe. (T. 3-144). Hiebert also testified that it was the routine and practice of his team to search all areas of a residence when entry is made. (T. 3-173).

An issue also arose during the hearing concerning a box of currency found in a closet in the guest house by Miami Beach Police Officer Charles Seraydar. Seraydar testified he searched the guest house at the time the warrants were executed. No one was found in the home, but Seraydar discovered a closet door locked with a deadbolt, but with a light on inside. Seraydar stated that he was concerned that someone could be concealed

inside the closet, so the police removed the hinge pins and the door. (T. 1-259). The closet was described as 3-feet deep and approximately 5-feet wide. When he entered the closet, Seraydar noticed a piece of carpet raised over a large box. The carpet was 18 inches off the floor, 2- to 3-feet long and 2- to 3-feet wide. (T. 1-261). Seraydar said he leaned over, stepped on the carpet and noticed the box. A corner of the box was in sight, and two bundles of $20 bills, each 12- to 13-inches high, were exposed. (T. 1-262). Seraydar pulled the carpet off, picked up the box and gave it to another agent. (T. 1-264). He estimated that the total time from entry into the residence to finding the box was three to five minutes. (T. 1-281).

The defendants contend that the search of the residence exceeded that allowed for the execution of the warrants, and thus, any evidence observed during the sweep should be excluded in determining whether the search warrant affidavit is supported by probable cause. The government argues that the entry and observations were permissible based on the protective sweep doctrine.

A protective sweep is permissible in conjunction with an in-home arrest if the searching officer possess a reasonable belief, based on specific and articulable facts, that an individual posing a danger to those on the scene is in the area to be swept. *Maryland* v. *Buie*, 494 U.S. 325, 335-38, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990). The Court in *Buie* defined a protective sweep as "a quick and limited search of a premises . . . narrowly confined to a cursory visual inspection of those places in which a person might be hiding." 494 U.S. at 327, 110 S.Ct. at 1094; *United States* v. *Diaz-Garcia*, 808 F.Supp. 784 (S.D. Fla. 1992).

Any evidence discovered in plain view during the proper scope of a protective sweep may also be seized. *United States* v. *Tobin*, 923 F.2d 1506, 1513 (11th Cir. 1991). Three basic conditions must be met to justify a plain view seizure. First, the

officer must not violate the Fourth Amendment in arriving at the place from which the incriminating evidence can be plainly viewed. Second, the incriminating character of the evidence must be immediately apparent. Finally, the officer must have a lawful right of access to the object itself. *Horton* v. *California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

To invoke the plain view doctrine, the officers must have probable cause to believe that the item viewed is evidence of a crime or is contraband. *Arizona* v. *Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. *Texas* v. *Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

The evidence presented to this court shows that the sweep conducted pursuant to the entry at La Gorce was limited to the search for other persons who might be on the premises. While the defendants have argued that such a search was not necessary due to the presence of the tear gas, this court finds that the agents acted reasonably and within the law in assuring themselves that no one was in fact present. Thus, this court finds that the scope of the search of the residence was not improper and recommends that suppression on this basis be DENIED. Similarly, the presence of the officers in the guest house, while awaiting the warrant, did not constitute an impermissible search or seizure. *See, Segura* v. *United States*, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1984).

The remaining area of concern for this court is the discovery of the box of currency by Officer Seraydar. This court finds Seraydar's entry into the guest house, *alone*, somewhat suspect, particularly in light of the testimony that the guest house possibly harbored guards for the residence, especially when compared to the nature of the entry into the main house. Additionally, this court has some concerns over the facts testified to by Seraydar concerning the discovery of the money. How-

ever, no testimony has been presented to this court to show that a search of the closet went beyond that allowed by a protective sweep. The officer's testimony concerning the movement of the carpet and the view of the box would allow for a finding of a proper plain view discovery. Additionally, the officer had sufficient facts, via discovery of a box of currency, to give rise to a "probability that incriminating evidence" was present. *See, Texas* v. *Brown, supra*. Overall, this court finds that the discovery of the currency falls within the plain view doctrine, and thus, the suppression of this evidence should be denied.

## II. 1247 SEMINOLE DRIVE

### A. ENTRY INTO THE RESIDENCE

The entry into the Fort Lauderdale residence was based on an arrest warrant for Augusto Falcon and was conducted shortly after the entry into the La Gorce home.

According to Special Agent Humberto Rapado of the FDLE, he learned of the Falcon residence from Jorge Lopez after Lopez was apprehended at the La Gorce residence. (T. 1-175). Lopez informed the agents that Falcon had lived at the residence approximately nine months. (T. 2-173). After Lopez and Rapado drove to the residence from La Gorce, Lopez pointed to the home and stated that Falcon was not at home since he had a black BMW and it was not there. (T. 1-176).[7] Approximately one hour after observing the residence, Rapado was notified that a black BMW with a male driver had arrived at the residence.

Based on the law cited above, particularly *Payton*, this court finds that the officers had "reason to believe" that Falcon was

[7]There was extensive discussion during the hearing of the discrepancy between the government response to the motion which indicated that Falcon had a red BMW and the testimony by Rapado that the vehicle was black. Additionally, much debate took place concerning the alleged sequential numbering of the license plates observed at La Gorce and those at Seminole Drive. This court finds that these items of evidence, whether contradictory or consistent, are immaterial to a determination of the propriety of entering the residence based on an arrest warrant for Falcon.

within the premises. While Lopez was untruthful with the officers at the La Gorce residence, his association with the defendants was sufficient to require an investigation by the officers. When Lopez and Rapado went to Fort Lauderdale, they drove to a specific home, and Rapado specifically mentioned that Falcon was not there because the BMW was not present. This information was corroborated when a man in a BMW did show up and entered the premises. As indicated, this court finds that the difference in color between the BMWs mentioned by the government does not vitiate the probable cause present for the execution of the warrant. Accordingly, the motion to suppress based on improper entry should be DENIED.

## B. SEARCH INCIDENT TO ENTRY

Deputy Cameron testified that, after the agents arrived at the home for the entry and announced their presence over a loudspeaker, a woman appeared in an upstairs window and then moved away. After a forced entry of the residence was made, a female (later identified as Alina Falcon) appeared on a catwalk, and after being ordered to come downstairs, she did so. At that point she was handcuffed and removed from the area near the door. After another announcement of their presence was made in the home, Falcon appeared with his hands up. He was also handcuffed and removed from the residence. (T. 1-211). Cameron stated that a room to room search then occurred, which lasted approximately ten minutes. The agents then went outside the residence. (T. 1-211-12). Falcon was transported from the residence between midnight and 12:30 A.M. (T. 1-241).

Agent Hiebert also testified about the search of the residence and stated that the agents searched all the rooms where someone could be hiding. (T. 3-159). Hiebert observed the cellular phones and the baggie with the powdered substance in plain

view while conducting this sweep. (T. 3-160). Hiebert testified that he left the residence at approximately midnight to 12:30 A.M. (T. 3-201).

Deputy Marshal Conboy testified that, while speaking with Mrs. Falcon after her apprehension, he requested some identification, so he accompanied her to the bedroom of the residence. (T. 2-58). Mrs. Falcon indicated where it was, and Conboy reached into a dresser drawer to retrieve it. (T. 2-59).

DEA Agent Jay Gregorius testified that he entered the residence approximately 10 to 15 minutes after the arrest warrant was executed and that Augusto Falcon was still present. (T. 2-186). Gregorius went in the residence to secure some cellular phones, a baggie which appeared to contain cocaine and some other items which he was told were seen in plain view during the security sweep. (T. 2-187). Gregorius testified that he found these items in plain view and secured them. He estimated that he left the residence at approximately 3:00 A.M. (T. 2-190). Gregorius was also present in the kitchen of the residence when Mrs. Falcon was later questioned. (T. 3-52).

DEA Agent Anthony Placido testified that the search warrant for the residence was executed the day after the arrest at approximately 2:00 P.M. (T. 3-210).

In support of the Motion to Suppress, Defendant Falcon presented attorney Jon May, who testified to an interview he held with Mrs. Falcon on August 6, 1992, immediately before her death. May testified that Mrs. Falcon stated that she and her husband were alone at the residence whey they heard a loud noise and heard men screaming in her home. (T. 4-16). She added that she left the bedroom, and was told by officers to come downstairs, where she was grabbed and taken out of the house. She stated that she told the agents that she did not know where Augusto Falcon was. (T. 4-27). Mrs. Falcon indicated that she was taken back into the house 30 to 45 minutes later, and saw the police looking around, opening drawers and

carrying various items out. (T. 4-20). Mrs. Falcon also stated that some of the items seized had not been in plain view, including currency and cocaine. (T. 4-22).

The defendant also presented testimony from Nancy O'Hare, who had rented the residence to the Falcons. O'Hare was at a nearby home the night of the arrests, and went to the scene when the entry began. O'Hare did not identify herself to the agents as the owner of the home, and did not approach or enter the residence at any time.

O'Hare testified that she saw Falcon being taken to a vehicle in handcuffs at approximately 12:30 A.M. (T. 4-97). O'Hare stated that she saw inside the home from a neighboring yard and observed Mrs. Falcon handcuffed in a kitchen chair while officers were searching the premises. O'Hare testified that the search included opening the kitchen cupboards. (T. 4-116). She stated this search occurred between 2:00 and 2:30 A.M. (T. 4-117). O'Hare also testified that the agents returned to the residence at about 10:30 the next morning and were looking through the house. (T. 4-125).

This court rejects O'Hare's testimony concerning the scope of the search. O'Hare's recollection of the events was almost too good, particularly in light of the fact that she could not even remember the address of the home she was renting at the time. Additionally, this court finds it somewhat incredulous that, as the owner of the home she never approached the officers while the search was taking place. Furthermore, her testimony concerning the officers' presence in the home the next morning is contradicted by evidence that the warrant was executed in the afternoon and by the fact that such a search would be unnecessary if the extensive search she described had taken place the night before.

Based on the law cited above, this court finds that the scope of the search at the residence on Seminole Drive was within that permitted as part of a protective sweep incident to an arrest. Accordingly, the motion to suppress on this basis should be DENIED.

## RECOMMENDATION

It is the recommendation of this court that the Motion to Suppress Evidence at 98 La Gorce be GRANTED, and that the Motion to Suppress Evidence seized at 1247 Seminole Drive be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte* v. *Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S.Ct. 397 (1988).

DONE AND ORDERED this 2nd day of September, 1993 at Miami, Florida.

STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Federico A. Moreno
Edward R. Shohat, Esq.
Simon Steckel, Esq.
Christopher J. Clark, Esq. – AUSA
Martin G. Weinberg, Esq.
Albert J. Kreiger, Esq.
Jeffrey S. Weiner, Esq.
Frank G. Rubino, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-6060-CR-MORENO

UNITED STATES OF AMERICA,
Plaintiff,

v.

AUGUSTO G. FALCON, SALVADOR MAGLUTA, ORLANDO LORENZO, ANTONIO GARRUDO, ET AL.,
Defendants.

ORDER GRANTING MAGLUTA AND LORENZO'S MOTION TO SUPPRESS EVIDENCE SEIZED IN SEARCHES CONDUCTED ON OR ABOUT OCTOBER 15, 1991 AND ORDER DENYING FALCON'S MOTION TO SUPPRESS PURSUANT TO MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendants Magluta and Lorenzo's Motion to Suppress Evidence Seized in Searches Conducted on or about October 15, 1991 at 98 East La Gorce Circle, Miami Beach and Defendant Falcon's Motion to Suppress Evidence Seized in Searches Conducted on or about October 15, 1991 at 1247 Seminole Drive, Fort Lauderdale.

THE MATTER was referred to the Honorable Stephen T. Brown, United States Magistrate Judge. A Report and Recommendation has been filed, recommending that Magluta and Lorenzo's motion to suppress be granted and that Falcon's motion to suppress be denied.

The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues presented by the objections to the Magistrate Judge's Report and Recommendation, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Stephen T. Brown's Report and Recommendation is RATIFIED, AFFIRMED and APPROVED in its entirety, and based thereon, Magluta and Lorenzo's motion to suppress evidence seized at 98 East La Gorce Circle, Miami Beach is GRANTED; further, Falcon's motion to suppress evidence seized at 1247 Seminole Drive, Fort Lauderdale is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of September, 1993.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:

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